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No. (1)

Supreme Court, U.S.
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Supreme Court of the United States

OFFICE OF THE CLERK
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LARRY MONROE,

Petitioner,

v.

CITY OF CHARLOTTESVILLE, TIMOTHY J. LONGO IN HIS OFFICIAL CAPACITY, AND JAMES MOONEY IN HIS OFFICIAL CAPACITY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER EQUAL PROTECTION REVIEW OF EXPLICITLY RACE-BASED CLASSIFICATIONS MADE BY THE POLICE IS ABSOLUTELY PRECLUDED WHERE THE RACIAL COMPONENT OF THE CLASSIFICATION IS PROVIDED BY A CRIME VICTIM?

PARTIES TO THE PROCEEDING

All of the parties to this matter are identified in the caption of the Petition.

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The decision of the United States District Court for the Western District of Virginia is reported at *Monroe v. City of Charlottesville*, 471 F. Supp. 2d 657 (W.D. Va. 2007), and is included in the Appendix to this Petition at pages A-1 through A-17. The decision of the United States Court of Appeals for the Fourth Circuit is reported at *Monroe v. City of Charlottesville*, 579 F.3d 380 (2009), and is included in the Appendix at pages A-18 through A-39.

STATEMENT OF JURISDICTION

The opinion and judgment of the Fourth Circuit were entered on August 31, 2009. A petition for rehearing and rehearing en banc was timely filed and an order summarily denying the petition was entered on September 29. 2009. The present Petition was filed on December 28, 2009, within the ninety-day period provided for in Rule 13(1) of the Rules of the Supreme Court of the United States. This Court has jurisdiction to review the decision of the Fourth Circuit pursuant to 28 U.S.C.A. § 1254(1) (2009).

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in relevant part, as follows: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

Facts. Sometime prior to April 1, 2002, citizens and police in Charlottesville, Virginia, became concerned about the possible presence in the area of a black, male "serial rapist." An investigation ensued which involved the policies challenged in this case. In response to the presence of this possible serial rapist, the police department for the City of Charlottesville, under the direction of its chief, Defendant Longo, began what has been described as a dragnet and adopted a policy of asking black males to provide DNA samples for comparison with DNA from one or more of the rapes.

Defendants agree that 190 persons were approached through April 2004 to provide DNA samples under the program described above, thirty of whom refused the request to provide a sample. It was stipulated that all persons approached were black males. A DNA sample was requested and obtained from the Plaintiff even though he is obese and no victim had described the assailant as being obese.

Defendant Longo stated at his deposition that "the common thread among them [the persons approached] is their race." The "physical characteristics aside from race and sex varied widely." Though Longo provided a list of potential additional factors that could possibly result in a person being considered (ranging from prior criminal history, to calls to 911, to a person's acting suspiciously), he could not identify what factors were taken into consideration with respect to any specific person approached and did

not alter his summary conclusion that the only "common thread" was race). There were no guidelines as to who should be approached other than black males.

> . . .. [T]he description that we obtained from victims about this suspect – one common thread was that he was male and that he was African-American. In addition to that there was a wide range of physical descriptors . . . which is anywhere from 5'6" to 5'7" to medium build to 6'2" and out of shape football player.

Procedural history. The Plaintiff filed an amended complaint setting forth claims in three counts. In Count I the Plaintiff alleged that the Defendants' policy of seeking DNA samples only from black males violated the Fourteenth Amendment because it was not narrowly tailored to exclude persons, such as the Petitioner, who did not fit the description. The Defendants moved to dismiss a portion of Count I and all of Count II pursuant to Fed. R. Civ. P. 12(b)(6). Thereafter the District Court granted the motion to dismiss the portion of Count I which gives rise to the present Petition. The trail court found that there was no race-based classification as a matter of law, and never reached the question of whether such a classification would pass strict scrutiny analysis. The parties eventually stipulated to the dismissal without prejudice of the remaining

claims in the case[1] and the Plaintiff thereafter filed a timely notice of appeal from the earlier order dismissing the relevant portion of Count I.

The Plaintiff perfected the appeal to the United States Court of Appeals for the Fourth Circuit, which heard argument and affirmed the decision of the trial court in an opinion decided on August 31, 2009. The Plaintiff filed a timely petition for rehearing and rehearing en banc, which was denied on September 29, 2009.

Basis of jurisdiction in the trial court. The Plaintiff filed suit under 42 U.S.C.A. § 1983 (2009). The United States District Court for the Western District of Virginia had jurisdiction under 28 U.S.C.A. § 1343(a)(3)-(4) (2009).

Basis of jurisdiction in the court of appeals. The district court entered its final order, which disposed of all of claims at issue between the parties, on February 20, 2008. The Plaintiff filed a notice of appeal on March 14, 2008. Because the notice of appeal was filed within thirty days of the entry of the district court's final order, it was timely. Fed. R. App. P. 4(a)(1). Because the notice of appeal was timely, the court of appeals had jurisdiction to review the judgment of the district court under 28 U.S.C.A. § 1291 (2009).

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[1]The parties entered into a settlement agreement which prevented the Plaintiff from pursuing the remaining claims in the future, thus resulting in a final reviewable decision even though the dismissal was without prejudice.

REASONS FOR GRANTING THE WRIT

This Court has long held, and repeatedly clarified, that *all* race-based classifications made by the government, whether serving benign or malign purposes, or indeed no purpose at all, are subject to strict scrutiny under the Fourteenth Amendment's Equal Protection Clause. This Court has likewise long held that the Equal Protection Clause applies even in those situations where the state is doing no more than incidentally enforcing purely private race-based classifications.

In the present case, despite the fact that the Defendants conceded that they sought DNA samples only from black males, the lower courts found that there had been no race-based classification by the police because the use of race by the police resulted from the identification of race by the victims of the assaults. The Fourth Circuit took a large and important portion of state-citizen interaction–the investigation of crimes by the police–and held that strict scrutiny does not apply, indeed that no race-based classification occurs at all, when race is explicitly used as a result of private citizen input. Because this decision upends decades of established equal protection jurisprudence and renders critical police action judicially unreviewable under the Equal Protection Clause of the Fourteenth Amendment, certiorari review should be granted and the decision below reversed.

CERTIORARI REVIEW IN THIS CASE IS NECESSARY TO ENSURE THAT EXPLICITLY RACE-BASED CLASSIFICATIONS BY THE GOVERNMENT ARE NOT SHIELDED FROM EQUAL PROTECTION REVIEW SIMPLY BECAUSE THE GOVERNMENT INCLUDES RACE AS A RESULT OF PRIVATE CITIZEN INPUT.

In the present case it is undisputed that the Defendants adopted a policy of obtaining DNA samples from citizens based in part upon the race of the persons from whom the DNA samples were to be sought.

Because the core of the Fourteenth Amendment is the prevention of unjustified official distinctions based on race, *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81 (1873); *Strauder v. West Virginia*, 100 U.S. 303, 307-08 (1880); *Ex Parte Virginia*, 100 U.S. 339, 344-45 (1880); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), racial classifications bear a far "heavier burden of justification" than do others. *In re Griffiths*, 413 U.S. 717, 721 (1973); *Hunter v. Erickson*, 393 U.S. 385, 392 (1969); *Loving v. Virginia*, 388 U.S. 1, 9 (1966). When proceeding on a direct discrimination basis, as the Plaintiff was in the present case, the plaintiff need not plead or prove discriminatory intent or animus. *Wayte v. United States*, 470 U.S. 598, 609 n.10 (1985). All he must prove is a classification based in part on race.

This Court has made clear that "*all racial classifications*, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (emphasis added). This is true not just when race is the only criteria used in the classification process, but also when it is but one "among many" factors considered by the government actor. *Grutter v. Bollinger*, 539 U.S. 306, 340 (2003).

Strict scrutiny applies regardless of whether the classification benefits or burdens historically disadvantaged groups, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (plurality opinion) (reaffirming the view that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification"), or even if the classification imposes no differential burden or benefit on different racial groups at all, *see Shaw v. Reno*, 509 U.S. 630, 651 (1993) (noting that "racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally"). This is so, the Court has indicated, because of the inherent difficulty in distinguishing benign classifications from illegitimate ones. *See Grutter*, 539 U.S. at 326.

For more than a half century this Court has also made it clear that state action which on its face is neutral and appears to make no outright classification, yet incorporates a privately originated, race-based,

classification, does in fact constitute impermissible race-based discrimination by the government. *See Shelley v. Kraemer*, 334 U.S. 1, 20-21 (1948) (holding that state court enforcement of private race-based restrictive real estate covenants is unconstitutional); *see, e.g., Evans v. Newton*, 382 U.S. 296, 297 (1966) (noting that municipality could not maintain a segregated park even though will conveying land to the municipality was the source of the segregation requirement).

Even though it was undisputed that the police in the present case adopted a policy of approaching citizens based explicitly, in part, on their race, the Fourth Circuit found that no race-based classification had been made by the Defendants. *Monroe v. City of Charlottesville*, 579 F.3d 380, 388 (4th Cir. 2009). The court concluded that no racial classification took place because the Defendants merely adopted their policy based upon the description given by the victims, which included race, and the victims were not singling out black men as a matter of "personal choice," nor were they "purposefully" doing so in an effort to deny members of that group their constitutional rights. *Id.* at 389. Thus the court held that the explicit use of race by the police in classifying citizens for further questioning and provision of DNA samples is not a violation of the Equal Protection Clause where the person who was the source of the racial element in the classification had no "choice" in the matter, or did not use race for the "purpose" of discriminating.

The Fourth Circuit's decision does not attempt to explain how "choice" or discriminatory "purpose" are

any different from the "intent" which this Court has said is *not* an element of an express classification claim. Because this Court in *Wayte* explicitly stated that a plaintiff does not need to prove that the actor intended to discriminate, purpose or volition would seem to be irrelevant–a purposeless classification based on race is no less express than an intentional one. The Fourth Circuit's decision fails to explain how the victim's lack of choice, or lack of discriminatory purpose, is not rendered irrelevant by this Court's holding that intent is immaterial.[2]

The Fourth Circuit distinguished this Court's decision in *Shelley* by stating that the plaintiffs in that case acted with the purpose of excluding blacks from

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[2]For the same reason, the Fourth Circuit's reliance upon this Court's decision in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), to support its decision is both troubling and worthy of review by this Court. The facts in *Iqbal* did not involve a policy which explicitly limited those subject to police scrutiny to persons of Arabic or Muslim origin. In fact, this Court explicitly noted that the policy at issue did *not* target either group. *Id.* at 1951. Rather, the Court noted that it was not surprising that a policy aimed at locating and arresting persons linked to terrorist attacks carried out by Arabs/Muslims would have a disproportionate, though incidental, impact on such persons. The present case involves a fact pattern where the police explicitly included race in their determination of from whom they were going to seek DNA samples. Application of *Iqbal* and its disparate impact analysis in the direct discrimination context is a significant error, and one which this Court should correct given the outsize impact that the *Iqbal* decision is playing in federal jurisprudence.

property ownership, *id.* at 388-89, and then concluded that because the victims in the present case did not use race "purposefully in an effort to deny that group a constitutional right" there was no race-based classification, *id.* at 389. However, this Court's decisions in *Adarand Constructors, Inc.*, 515 U.S. at 227; *J.A. Croson Co.*, 488 U.S. at 494 (reaffirming the view that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification"), and *Shaw*, 509 U.S. at 651 (noting that "racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally"), make clear that *all* racial classifications, even if they have a purpose not of denying constitutional rights but instead of conferring benefits, are still classifications and still subject to strict scrutiny. Intent, choice and purpose are not elements of the equal protection analysis in a direct discrimination claim. Moreover, it is not the state of mind of the person that provided the racial component in the first place that matters in the constitutional analysis; what *is* being challenged is the *government's* decision to *incorporate* the racial component into its classification, a decision which the government clearly had the choice not to do.[3]

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[3]The Petitioner does not suggest that race should be ignored in cases such as the present and the police investigate Caucasians as possible suspects even though victims have identified the assailant as black. Instead, strict scrutiny requires that the police further refine the search so as to narrowly tailor it to a subset of black men who might truly be suspects. For example, when the assailant is identified as white the police do not attempt to procure DNA samples from

The Fourth Circuit's decision is particularly problematic because it holds that no classification took place at all.[4] Because there was no classification not only is there no strict scrutiny review, there is no review at all, not even rational basis review. And its decision sweeps far beyond the facts of the present case; race of the assailant is almost always a factor identified by a crime victim and thus almost every police investigation, under the Fourth Circuit's analysis, is absolutely protected from equal protection review. Such a broad holding, and one which so severely restricts judicial review, is a dramatic departure from this Court's jurisprudence which needs review by this Court.

Resolving the role the federal courts should play in reviewing daily interactions between the police and citizens where an issue as volatile as race is involved is both vitally important and uncomfortable for lower court judges, more reason why review by this Court is called for. That the two courts of appeals that have

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an indiscriminate sample of the Caucasian population; instead, they use traditional police investigatory techniques and data analysis to reduce the field of people from whom DNA samples are sought.

[4]In dicta, the Fourth Circuit stated that even if there had been a race-based classification, it would pass strict scrutiny analysis. Besides being dicta, this conclusion was flawed because the trial court dismissed the claims on a motion to dismiss–and explicitly refused to conduct strict scrutiny review–and the Fourth Circuit based its conclusion on facts never submitted to the trial court and which were in significant dispute between the parties.

addressed the precise issue raised by this case, the Fourth Circuit below and the Second Circuit in *Brown v. City of Oneonta*, 221 F.3d 329 (2d Cir. 1999), *reh'g en banc denied,* 235 F.3d 769 (2d Cir. 2000), have reached the same incorrect result indicates that intervention by this Court is required. Commentators assumed that the earlier decision in *Brown* simply indicated an unwillingness, prior to this Court's clarifying in *Grutter* that strict scrutiny applies any time race is used, even if other non-racial characteristics are considered, to bring the specter of strict scrutiny into play in the arena of police investigations of crime. *See, e.g.*, Michael R. Smith, *Depoliticizing Racial Profiling: Suggestions for the Limited Use and Management of Race in Police Decision-Making*, 15 Geo. Mason U. Civ. Rts. L.J. 219, 235-36 (2005); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 Harv. L. Rev. 493, 512 (2003). That, post-*Grutter*, the Fourth Circuit is still making the same mistake indicates that a larger issue, requiring direction from this Court, is in play.

Finally, the Fourth Circuit's analysis is not limited to the criminal context. If the decision is not reversed then government actors can simply outsource racial discrimination by incorporating private input into government decision-making. For example, the government could establish a citizen advisory panel to recommend contractors for government projects. If the citizen advisory panel elects to include race among the factors that it considers, the government's later use of the panel's recommendation is insulated from equal protection review under the Fourth Circuit's analysis,

even though had the government made the same decision itself it would clearly have required strict scrutiny by the courts. Such an easy end-run around this Court's established equal protection requirements must be prohibited.

CONCLUSION

The Fourth Circuit's conclusion that an admittedly race-based governmental classification is not a race-based classification for the purposes of the Fourteenth Amendment creates a dangerous precedent with national implications. It permits government actors to use race in governmental decision-making, and avoid judicial scrutiny under the Equal Protection Clause entirely, simply by incorporating explicit racial criteria provided by private citizens. Certiorari review should be granted to preserve the protections of the Fourteenth Amendment that this Court has established.

Respectfully submitted,

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by counsel.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

APPENDIX

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APPENDIX

[DISTRICT COURT DECISION]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Charlottesville Division

LARRY MONROE,

Plaintiff,

v.

CITY OF CHARLOTTESVILLE, VIRGINIA, AND TIMOTHY J. LONGO, SR. (IN HIS OFFICIAL CAPACITY), AND JAMES MOONEY (IN HIS OFFICIAL CAPACITY),

Defendants

CIVIL NO. 3:05cv00074

January 31, 2007

MEMORANDUM OPINION

This matter is before the Court on Defendants' Motion to Dismiss, filed on September 7, 2006 (docket entry no. 49). For the following reasons, this motion will be granted in part and denied in part in an order to follow; additionally, Plaintiff will be given leave to file a second amended complaint as directed in the order to follow.

I. BACKGROUND

A. Factual Background

This case arises out of Defendants' investigation of an alleged serial rapist who has attacked women in the Charlottesville area. In a light most favorable to Plaintiff, the allegations are as follows.

According to Plaintiff, a single individual has committed several sexual assaults in central Virginia over the past several years. Although the Defendants do not know the physical identification of the assailant, they allegedly do have samples of the assailant's DNA; additionally, the victims of the assaults have consistently described the assailant as a youthful-looking black male.

In response to reports of these assaults, Plaintiff alleges that Defendants adopted a policy by which they would approach (1) black (2) males (3) who were youthful-looking and (4) from whom Defendants had not previously obtained a DNA sample. Plaintiff alleges that Defendants then requested DNA samples from these individuals, one of whom was Plaintiff. Apart from sharing these characteristics (black, male, youthful-looking, no DNA on file), the individuals who were approached had little else in common--some were light-skinned, others had dark skin; some were short, others were tall; some were light and thin, others were broad and heavy.

Plaintiff alleges that none of the victims identified the assailant as a "noticeably broad or

heavy" black male. Despite this allegation, Plaintiff--who is admittedly "noticeably broad and heavy"--alleges that he was approached at his home and was coerced into giving a DNA sample, as were other black males. These individuals could not decline giving consent to the DNA request without incurring unspecified negative consequences.

Plaintiff alleges that there have been reports of sexual assaults committed in the Charlottesville area by youthful-looking white males, but in these circumstances, Defendants have not instituted a policy whereby they approach youthful-looking white males and request a DNA sample.

B. Procedural Background

Plaintiff therefore sued Defendants, alleging violations of the Equal Protection Clause of the Fourteenth Amendment and a violation of the Search and Seizure Clause of the Fourth Amendment.

Defendants have moved to dismiss Counts I and II of Plaintiff's amended complaint.

II. STANDARD OF REVIEW

"The purpose of a Rule 12(b)(6) motion is to test the sufficiency of a complaint," not to "resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Edwards v. City of Goldsboro,* 178 F.3d 231, 243-44 (4th Cir. 1999).

In considering a Rule 12(b)(6) motion, a court must accept all allegations in the complaint as true, must draw all reasonable inferences in favor of the plaintiff, and should not dismiss unless the defendant demonstrates "beyond doubt that the plaintiff can prove no set of facts in support of [the plaintiff's] claim" that would allow the plaintiff relief. *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); *see also Edwards,* 178 F.3d at 244; *Warner v. Buck Creek Nursery, Inc.,* 149 F. Supp. 2d 246, 254-55 (W.D. Va. 2001). Stated differently, a "court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Swierkiewicz v. Sorema N. A.,* 534 U.S. 506, 514, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002).

As the Fourth Circuit has held, however, *Swierkiewicz* did not eliminate the requirement that a plaintiff "must sufficiently allege facts to allow the Court to infer that all elements of each of his causes of action exist." *See Jordan v. Alternative Res. Corp.,* 458 F.3d 332, 344-45 (4th Cir. 2006), *reh'g en banc denied,* 467 F.3d 378 (4th Cir. 2006); *Chao v. Rivendell Woods, Inc.,* 415 F.3d 342, 348 (4th Cir. 2005) (stating that a complaint is sufficient "if, in light of the nature of the action, the complaint sufficiently alleges each element of the cause of action so as to inform the opposing party of the claim and its general basis"); *Bass v. E.I. DuPont de Nemours & Co.,* 324 F.3d 761, 765 (4th Cir. 2003) ("[Although] a plaintiff is not charged with pleading facts sufficient to prove her case, as an evidentiary matter, in her complaint, a plaintiff *is*

required to allege facts that support a claim for relief."); *Dickson v. Microsoft Corp.*, 309 F.3d 193, 213 (4th Cir. 2002) ("*Swierkiewicz* ... did not alter the basic pleading requirement that a plaintiff set forth facts sufficient to allege each element of his claim."); *Iodice v. United States*, 289 F.3d 270, 281 (4th Cir. 2002) ("Even in these days of notice pleadings, a complaint asserting a negligence claim must disclose that each of the elements is present in order to be sufficient." (citation omitted) (internal quotation marks omitted)); *see also Inman v. Klockner-Pentaplast of America, Inc.*, No. 3:06cv00011, 467 F. Supp. 2d 642, 2006 U.S. Dist. LEXIS 93620, 2006 WL 3821487, at *4 (W.D. Va. Dec. 28, 2006) ("This Court will endeavor to follow the Fourth Circuit's post-Swierkiewicz holdings. As such, plaintiff[] must sufficiently allege facts to allow the Court to infer that all elements of each of his causes of action exist.")

The Fourth Circuit has also stated, however, that motions filed under Rule 12(b)(6) "should be granted only in very limited circumstances." *Rogers v. Jefferson-Pilot Life Ins. Co.*, 883 F.2d 324, 325 (4th Cir. 1989). This is especially true for Rule 12(b)(6) motions made by plaintiffs seeking relief under 42 U.S.C. § 1983, as Plaintiff is here. *See Harrison v. U.S. Postal Serv.*, 840 F.2d 1149, 1152 (4th Cir. 1988) ("In evaluating a civil rights complaint for failure to state a claim under ... 12(b)(6), we must be especially solicitous of the wrongs alleged. We must not dismiss the complaint unless it appears to a certainty that the plaintiff would not be entitled to relief under any legal theory [that] might plausibly be suggested by the facts alleged." (internal quotation marks omitted) (footnote

call number omitted)); *see also Edwards,* 178 F.3d at 244.

III. DISCUSSION

A. Count I (Equal Protection Clause violations)

Plaintiff alleges in Count I that Defendants violated the Equal Protection Clause[1] in two ways. First, Plaintiff alleges that in investigating sexual assaults allegedly committed by youthful-looking black males, Defendants have a policy of approaching youthful-looking black males, but that in investigating sexual assaults allegedly committed by youthful-looking white[2] males, Defendants do *not* have a policy of approaching youthful-looking white males. This, Plaintiff says, is a constitutional violation because Defendants' decision of whether or not to have a policy of approaching potential assailants is based solely on the race of the potential assailant.[3] Second, Plaintiff

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[1]"No State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

[2]Although Plaintiff alleges a non-policy with respect to *white* males, his claim would be just as valid if he alleged a non-policy with respect to *non-black* males.

[3]This is true regardless of the origin of the information regarding the assailant's race. In other words, for purposes of the alleged policy and alleged non-policy, the source of the information regarding the alleged assailant's race is irrelevant: Plaintiff's allegation is that once having that information, Defendants employ a certain policy when that

alleges Defendants targeted Plaintiff because of his race in violation of the Equal Protection Clause.

As the Second Circuit has noted, there are three ways in which a plaintiff can show discrimination in violation of the Equal Protection Clause: (1) showing a law or policy that "expressly classifies persons on the basis of race"; (2) showing a facially neutral law or policy that "has been applied in an intentionally discriminatory manner"; or (3) showing a facially neutral law or policy that "has an adverse effect ... motivated by discriminatory animus." *See Brown v. City of Oneonta,* N.Y., 221 F.3d 329, 337 (2d Cir. 2000).

1. Race-based investigation policy

Although Plaintiff has referred to this prong of her Equal Protection claim as a disparate treatment claim, the Court is more convinced that her claim is an express classification on the basis of race. It would be the former, for example, if Defendants instituted the following policy: every time a rape is reported and the alleged assailant's race is unknown, police officers are directed to approach and question every resident who lives in "Neighborhood A," a neighborhood whose

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race is black and do not employ that policy when that race is non-black. The origin of the information regarding the assailant's race *is* relevant, however, in an analysis of Plaintiff's second Equal Protection claim, which is discussed below.

residents are overwhelmingly black.[4] Here, Plaintiff alleges instead that the Defendants' decision regarding whether or not to institute a policy of approaching potential suspects is based solely on the suspects' race. Defendants allegedly instituted the following policy: in investigating a serial crime allegedly committed by a black assailant, police officers are directed to approach and question black Charlottesville residents; in investigating a serial crime allegedly committed by a non-black assailant, however, police officers are directed to *not* approach or question non-black Charlottesville residents.[5]

Because the Court has determined that Plaintiff's allegation constitutes an express racial classification, strict scrutiny is automatically triggered and Plaintiff has stated a claim upon which relief can be granted. *See, e.g., Gratz v. Bollinger*, 539 U.S. 244, 270, 123 S. Ct. 2411, 156 L. Ed. 2d 257 (2003) ("It is by now well established that all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized.... To withstand our strict scrutiny analysis, respondents must demonstrate that the ... use of race ... employs narrowly tailored measures that further compelling governmental interests.") (citations

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[4]In such a situation, Plaintiff would be required to show discriminatory intent or animus and he would need to show a similarly situated group that was treated differently.

[5]It is important to note again that, at this stage, the Court must take Plaintiff's allegations as true; the Court is not deciding whether Defendants actually instituted this policy.

and quotation marks omitted); *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 227, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995) ("Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."). Additionally, because the Court is convinced that Plaintiff has alleged an express racial classification, Plaintiff need not allege racial animus or discriminatory intent; nor must he allege the existence of a similarly situated non-minority group. *See Farm Labor Org. Comm. v. Ohio State Highway Patrol,* 308 F.3d 523, 533-34 & n.4 (6th Cir. 2002); *Brown,* 221 F.3d at 337 ("Plaintiffs are correct, however, that it is not necessary to plead the existence of a similarly situated non-minority group when challenging a law or policy that contains an express, racial classification.").

For these reasons, Defendant's motion to dismiss Count I with respect to the alleged race-based policy will be denied in an order to follow.

2. Race-based decision to approach Plaintiff

Separately, Plaintiff alleges that in approaching him, Defendants expressly classified Plaintiff on the basis of his race.

Defendants argue that this claim should be dismissed because the description of the assailant as a youthful-looking black male originated with the

victims of the sexual assaults, who all--uniformly--describe the assailant as such. Defendants cite cases from the Second (*Brown,* 221 F.3d at 329), Third (*Hall v. Pa. State Police,* 570 F.2d 86 (3d Cir. 1978)), and Sixth (*United States v. Travis,* 62 F.3d 170 (6th Cir. 1995) Circuits for support for the proposition that when an assailant's description originates with the victim and not with the state, there is no direct discrimination. Therefore, Defendants argue, Plaintiff must show that Defendants had discriminatory intent in carrying out their policy.

Again, the sole issue before the Court is whether Plaintiff has stated a claim upon which relief can be granted. It is clear, as Defendants have argued, that (1) when a victim of a crime provides investigators with a description of her assailant, (2) that description includes the assailant's race and gender, and (3) investigators then act on that description, there is no express racial classification. *See, e.g., Brown,* 221 F.3d at 337 (stating that express racial classifications are subject to strict scrutiny but that this argument "does not avail plaintiffs in this case ... because they have not identified any law or policy that contains an express racial classification"). In affirming dismissal of the plaintiff's § 1983 claims that the defendants allegedly violated the Fourteenth Amendment, the *Brown* court stated flatly:

> [T]hey were not questioned solely on the basis of their race. They were questioned on the altogether legitimate basis of a physical description given by the victim of a crime. Defendants' policy

> was race-neutral on its face; their policy was to investigate crimes by interviewing the victim, getting a description of the assailant, and seeking out persons who matched that description.

Id. at 337.

As the *Brown* court noted, this would be a different case indeed if, upon learning that a rape had been committed, Defendants "used an established profile of violent criminals to determine that the suspect must have been black." *Id.* This would also be a different case if Plaintiff alleged "that the defendant law enforcement agencies have a regular policy based upon racial stereotypes that all black ... residents be questioned whenever a violent crime is reported." *Id.* Neither of these types of cases is alleged here.

Plaintiff tries to save his claim first by noting the criticism *Brown* has faced since it was decided. Plaintiff cannot, however, get around the fact that *Brown* is still good law, despite any criticism it has received.

Plaintiff also argues that since the Supreme Court's decision in *Grutter v. Bollinger,* 539 U.S. 306, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003), any "race-plus" policy is subject to strict scrutiny. Plaintiff argues that because Defendants used race as a factor *at all* (regardless of the fact that race was coupled with youthfulness and whether DNA was on file), strict scrutiny should apply. Because there is no explicit racial classification and because Plaintiff has failed to

allege discriminatory intent,[6] the Court need not even decide what level of scrutiny would apply. Instead, Plaintiff's claim fails as a matter of law. Therefore, the Court will not address the question of whether to graft *Grutter* onto *Brown* to, in essence, require strict scrutiny analysis in any case involving a police investigation that is based on a description of an assailant when that description includes--in part--the assailant's race.

Finally, Plaintiff argues that regardless of whether *Grutter* applies, the facts in *Brown* and the facts in this case are distinguishable. Plaintiff's argument is unavailing. Although the facts in *Brown* and the facts in this case are different, they are not dispositively so. In *Brown,* an assailant broke into the home of a seventy-seven-year-old woman and attacked her. *Brown,* 221 F.3d at 334. The woman described the assailant as a youthful-looking black man who likely suffered a cut on his hand during the attack. Plaintiff

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[6]Facts supporting such an allegation would be required in an analysis of facially neutral discrimination. *See, e.g., Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.,* 429 U.S. 252, 264-265, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977) ("[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact. 'Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination.' Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.") (citations omitted); *see also Brown,* 221 F.3d at 337 (stating that a plaintiff who alleges discrimination under a facially neutral law or policy would have to show either (1) intentional discrimination or (2) an adverse effect plus discriminatory animus).

contends that there was no similar "cut-on-the-hand" description in this case "or any other factor separable from race that le[]d the Defendants in the present case to approach the Plaintiff and the other members of the proposed class." The Court respectfully disagrees. The *Brown* victim described her assailant as a (1) youthful-looking (2) black (3) male who (4) had a cut on his hand. Here, based on interviews with the multiple victims and, presumably, comparisons of DNA results, the assailant is described as a (1) youthful-looking (2) black (3) male who (4) did not have his DNA on file. This one factual difference (cut on the hand instead of no DNA on file) does not affect the underlying rationale of the court's decision in *Brown*.

Therefore, Defendants' motion to dismiss the second part of Plaintiff's Count I claim will be granted.

B. Count II (Search and Seizure Clause violation)

Plaintiff alleges in Count II that Defendant James Mooney ("Mooney") violated the Search and Seizure Clause of the *Fourth Amendment* in that Plaintiff was "subjected to" an encounter with Mooney, a Charlottesville police officer.[7] In support of this unlawful seizure claim, Plaintiff alleges only that he "was visited in his home and coerced into giving a DNA sample although his appearance, upon

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[7]Defendants did not move to dismiss Count III of Plaintiff's amended complaint--that the taking of bodily fluids from Plaintiff constituted a Fourth Amendment violation (a claim of unlawful search).

information and belief, matched no composite or any other description of the assailant other than his being a black male." (Am. Compl. P 25)

Even if he could prove that the statement in paragraph twenty-five were true, Plaintiff would not state a claim upon which relief could be granted, at least with respect to Count II. Police officers need not have any basis whatsoever for suspecting a particular individual before approaching that individual. *Florida v. Bostick,* 501 U.S. 429, 434-35, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991) ("We have stated that even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual."). Plaintiff argues in his memorandum in opposition that he *could* prove a set of facts showing that the encounter between Mooney and Plaintiff was not consensual. But Plaintiff's complaint only says that he "was visited in his home." Nowhere does the complaint allege that Plaintiff did not feel free to leave, nor does it allege facts that could give rise to such an inference.[8] Therefore, the Court will grant

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[8]The Court understands that Plaintiff has stated in a previously submitted memorandum that "Plaintiff intends to establish that the nature of all of the encounters with class members was non[-]consensual given the environment at the time, the general relationship between the police department and members of the minority community, the locations in which the encounters took place, the techniques used by the officers in making their requests[,] and other factors." Additionally, Defendants know (according to Plaintiff) that Plaintiff "did not feel free to decline to respond to Officer Mooney's questions and go on his way." None of these

Defendants' motion to dismiss Count II, but will grant Plaintiff leave to amend his complaint.

IV. CONCLUSION

For the reasons stated above, Defendant's motion will be denied with respect to Plaintiff's first Equal Protection claim in Count I of his amended complaint, granted with respect to Plaintiff's second Equal Protection claim in Count I, and granted with respect to Count II, all in an order to follow. Plaintiff will, however, be given leave to amend Count II of the amended complaint as directed in the order to follow.

It is so ORDERED.

The Clerk of the Court is hereby directed to send a certified copy of this Memorandum Opinion to all counsel of record.
ENTERED: Norman K. Moon
United States District Judge

January 31, 2007
Date

ORDER

JUDGE NORMAN K. MOON

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allegations, however, are contained within Plaintiff's amended complaint.

This matter is before the Court on Defendants' Motion to Dismiss, filed on September 7, 2006 (docket entry no. 49). For the reasons stated in the accompanying Memorandum Opinion, the Court hereby ORDERS that:

(1) regarding Count I of Plaintiff's amended complaint, Defendants' motion is DENIED with respect to Defendants' alleged race-based policy;

(2) regarding Count I of Plaintiff's amended complaint, Defendant's motion is GRANTED with respect to Defendants' alleged race-based decision to approach, request, and obtain DNA samples from Plaintiff; this latter Fourteenth Amendment violation claim under Count I is DISMISSED WITH PREJUDICE; and

(3) regarding Count II of Plaintiff's amended complaint, Defendants' motion is GRANTED, but Plaintiff is hereby given fifteen days within which to file an amended complaint properly alleging a violation of the Fourth Amendment with respect to Plaintiff "being subjected to encounters" with Defendants. If Plaintiff does not or can not allege such a violation within fifteen days, Count II will be dismissed.

It is so ORDERED.

The Clerk of the Court is hereby directed to send a certified copy of this Order to all counsel of record.

ENTERED: Norman K. Moon
United States District Judge

January 31, 2007
Date

[COURT OF APPEALS DECISION]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1334

LARRY MONROE, on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

v.

CITY OF CHARLOTTESVILLE, VIRGINIA; TIMOTHY J. LONGO, SR., In his official capacity; JAMES MOONEY, Police Officer in his official capacity,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Virginia, at Charlottesville. Norman K. Moon, District Judge. (3:05-cv-00074-NKM-JGW)

Argued: May 12, 2009
Decided: August 31, 2009

Before SHEDD, Circuit Judge, C. Arlen BEAM, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation, and Joseph F. ANDERSON, Jr., United

States District Judge for the District of South Carolina, sitting by designation.

Affirmed by published opinion. Senior Judge Beam wrote the opinion, in which Judge Shedd and Judge Anderson joined.

COUNSEL

ARGUED: Neal Lawrence Walters, SCOTT KRONER, PLC, Charlottesville, Virginia, for Appellant. Alvaro A. Inigo, ZUNKA, MILNOR, CARTER & INIGO, LTD., Charlottesville, Virginia, for Appellees. **ON BRIEF**: Deborah C. Wyatt, WYATT & ASSOCIATES, Charlottesville, Virginia, for Appellant. Richard H. Milnor, ZUNKA, MILNOR, CARTER & INIGO, LTD., Charlottesville, Virginia, for Appellees

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OPINION

Larry Monroe appeals the district court's dismissal of his § 1983 action, alleging the court erred in (1) denying his motion for class action certification, (2) dismissing his Fourth Amendment claim for failure to plead facts sufficient to show a seizure, and (3) finding no equal protection violation because a racial classification had not occurred. We affirm.

I.

In the spring of 2002, Charlottesville Police began investigating a serial rapist who was consistently described by victims as a youthful-looking black male. At least three composite images were formed based on descriptions given by victims over the course of the investigation. In addition to the descriptions, however, officers also had samples of the assailant's DNA. In an effort to apprehend the attacker, officers approached individuals in the community who matched the general description and who did not have a DNA sample on file with police, and asked those individuals if they would submit a DNA specimen. Those approached varied somewhat in height, build, and skin tone, but all were African-American. The individuals came to the attention of officers through various means, but in total, 190 youthful-looking black males were stopped over several years, including Monroe, who was approached at his home by Officer Mooney. Other individuals were stopped on the street by officers and asked to submit a DNA sample.[1]

Monroe sued the City of Charlottesville and individual officers, including Officer Mooney

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[1]With perhaps minimal exceptions, only persons reasonably matching a developed composite image, and those who came to light via a Crimestoppers tip or who turned up in a search of police records, most often after having been arrested on a sexual misconduct charge, were among the 190 individuals ultimately contacted. State Court Trial Transcript at 151-52, *Monroe v. City of Charlottesville*, No. 3:05-cv-00074 (W.D. Va.) (exhibit to motion for partial summary judgment filed Mar. 22, 2006).

(collectively, "the City"), under *§ 1983* alleging violations of the *Fourth* and *Fourteenth Amendments*. Specifically, Monroe alleged an equal protection violation on the grounds that he was stopped because he was black, and because officers do not perform such "dragnet" stops of individuals when the victim describes an assailant as white. In addition, Monroe alleged he was subject to an unreasonable seizure when Officer Mooney came to Monroe's home and when Monroe gave bodily fluids for DNA analysis. Monroe sought to pursue his equal protection claim as a class action.

The district court, on the City's Rule 12(b)(6) motion,[2] dismissed that portion of Monroe's equal protection claim that alleged a violation on the grounds that Monroe was approached because he was black. Citing *Brown v. City of Oneonta,* 221 F.3d 329 (2d Cir. 2000), the district court held that the government does not expressly classify a person based on race, and the Equal Protection Clause is not

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[2] While ostensibly considered on a Rule 12(b)(6) motion, a substantial number of uncontested material facts from outside of the pleadings concerning the equal protection claim were presented to and considered by the district court. This information came from a transcript of the evidence from a state trial proceeding instituted by Mr. Monroe against Officer Mooney, one of the defendants here. "While it may [have been] preferable for [the] district court to trigger" a conversion of the Rule 12(b)(6) motion to one under Rule 56, a conversion, sua sponte, by an appellate court, as necessary, is generally permitted. *Bosiger v. U.S. Airways,* 510 F.3d 442, 450 (4th Cir. 2007).

implicated, when officers limit their investigation to only those persons matching a victim's description of an assailant. Monroe could proceed, however, on the claim that the City does not investigate crimes the same way when the assailant is described as white. The district court also dismissed Monroe's claim that he was unreasonably seized when Officer Mooney came to Monroe's home because Monroe failed to state facts sufficient to show the consensual encounter escalated to a seizure. Monroe was granted leave to amend his complaint, however, and his claim that his bodily fluids were unreasonably seized was allowed to proceed.

Monroe's amended complaint alleged the same claims as the first complaint, but with more factual allegations. Specifically, regarding Monroe's Fourth Amendment claim, he asserted a seizure on account of Officer Mooney coming to Monroe's home in uniform, asking for a DNA sample, and failing to tell Monroe he could decline the request. In addition, because the encounter was at Monroe's home, and based on "[t]he state of relations between law enforcement and members of minority communities," he alleged that it was objectively reasonable to feel he was not free to terminate the interaction.

The City again moved to dismiss for failure to state a claim. And, the district judge again dismissed that part of Monroe's equal protection claim alleging a violation because officers only approached him because he was black, but allowed the remaining portion to proceed. Also, the district judge again dismissed Monroe's claim that he was unreasonably seized,

stating that the newly alleged facts did not cure the original deficiencies. Monroe's remaining unreasonable seizure claim--his giving Officer Mooney bodily fluids for DNA analysis--was permitted to proceed. The district court then set the date for a class certification hearing and established July 13, 2007, as the deadline for the parties to file memoranda on that issue.

Along with its motion in opposition to class certification, the City submitted an affidavit from Officer Sclafani reciting a conversation he had with Monroe where Monroe made several statements undermining his fitness to serve as a class representative, including: Monroe's attorneys would not return his calls, the attorneys originally approached him about filing suit, he only learned the suit was filed in his name after reading about it in the paper, the lawsuit made him look bad, and he was not interested in pursuing money damages against Officer Mooney. Monroe did not file a response by the deadline and the class certification hearing was held on July 20, 2007. At the hearing, the central issue was Monroe's adequacy to represent the class. Monroe, however, did not attend the hearing and did not submit an affidavit in response to Officer Sclafani's. Rather, Monroe's attorney testified that she always returns calls and that Monroe originally approached her about filing suit. In addition, Monroe's attorney submitted Monroe's deposition testimony as evidence of his adequacy to serve as a class representative. At the end of the hearing, the district judge asked, "Any other evidence to come in?" Monroe's attorney responded, "No further evidence, Your Honor." Yet, on July 23, 2007, Monroe filed an affidavit refuting Officer

Sclafani's affidavit, and the City opposed the submission as untimely.

In its order, the district judge declined to consider Monroe's untimely affidavit, and denied Monroe's motion for class certification because Monroe failed to show that he would adequately represent the class. The court relied in large part upon Officer Sclafani's affidavit. The district court also relied on the fact that in Monroe's deposition, Monroe could not recognize the complaint and had little to no knowledge about the lawsuit. Monroe was allowed to proceed on his individual claims of (1) an equal protection violation based on the City's alleged failure to institute similar investigation methods when the assailant is described as white, and (2) the unreasonable seizure of his bodily fluids. Rather than proceed, however, Monroe filed a voluntary motion to dismiss his remaining claims without prejudice. To secure the City's consent to Monroe's motion and establish appellate jurisdiction, the parties agreed that Monroe would be precluded from filing suit on those claims in the future--rendering the dismissal one with prejudice. The district court then dismissed Monroe's remaining claims.

Monroe now appeals the denial of class certification, the dismissal of his Fourth Amendment claim, and the dismissal of his equal protection claim.

II.

A. Class Certification

The district court's denial of class certification is reviewed for an abuse of discretion, and such decisions are "generally accorded great deference." *Simmons v. Poe*, 47 F.3d 1370, 1380 (4th Cir. 1995). Rule 23(a) of the Federal Rules of Civil Procedure establishes four class certification requirements: (1) a class so numerous that joinder of all members is impracticable; (2) questions of law or fact common to the class; (3) a representative party whose claims and defenses are typical of the class's claims and defenses; and (4) a representative party that will fairly and adequately protect the class's interests. *Id.* A plaintiff bears the burden of proving these requirements. *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 317 (4th Cir. 2006).

The district court denied Monroe's class certification on the grounds outlined in Rule 23(a)(4)--that Monroe would not fairly and adequately represent the interests of the class. Monroe alleges two errors. First, Monroe alleges the district court erred in denying admission of his affidavit as untimely when no timing for the admission of evidence was discussed and the affidavit countered Officer Sclafani's affidavit. Second, Monroe claims that even if his affidavit is not considered, Rule 23(a)(4) was satisfied because he was not simply lending his name to a suit controlled entirely by the class attorney as the district court seemed to find.

The district court did not abuse its discretion in refusing to consider Monroe's untimely affidavit. When deciding a motion for class certification, a district court does not accept the plaintiff's allegations in the

complaint as true; rather, an evidentiary hearing is typically held on the certification issue. *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 365-67 (4th Cir. 2004); *see also* 5 James W. Moore et al., *Moore's Federal Practice* § 23.82(2) (3d ed. 1998). Further, this court defers to the right of a district court to set and enforce pre-trial filing deadlines. In this case, the district court set July 13, 2007, as the deadline for submitting memoranda on the issue of class certification, and Monroe concluded the July 20, 2007, class certification hearing by stating that he had no further evidence to submit on the issue. Thus, the district court acted within its sound discretion by striking Monroe's untimely affidavit submitted on July 23, 2007.[3]

Turning to the court's application of Rule 23(a)(4), the district court did not abuse its discretion in denying class certification on the evidence presented. To satisfy Rule 23(a)(4), a class representative must, among other factors, be of a character to vigorously pursue the case. 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1766 (3d ed. 2005)

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[3]Even if Monroe's affidavit had been considered, it adds nothing to the record that would alter the district court's decision. Monroe's proffered affidavit only addresses the contention that the class attorneys were not responsive by stating that Monroe merely said he "had not heard anything in awhile"--a tenuous distinction at best. And while Monroe also stated in the affidavit that he wanted to proceed with the lawsuit, Officer Sclafani said nothing about whether Monroe wanted to continue the lawsuit, and the district did not rely on any such statement.

(collecting cases). Findings that a representative lacks sufficient interest, credibility, or either knowledge or an understanding of the case--although a knowledge or understanding of all the intricacies of the litigation is not required--are grounds for denying class certification. *Id.* The analysis is intended "to ensure that the parties are not simply lending their names to a suit controlled entirely by the class attorney." *Id.*

With these principles in mind, the district court made findings showing that Monroe had little interest in or knowledge and understanding of the case, and appeared to be merely lending his name to the suit. The City offered evidence showing Monroe (1) was unaware of the suit and only learned the suit was filed in his name after reading about the lawsuit in the newspaper; (2) said the class attorneys would not return his calls; and (3) believed the lawsuit made him look bad. The only rebuttal evidence Monroe offered was his attorney's testimony that she "always returns calls" and that Monroe approached her about the suit. Further, at Monroe's deposition, he could not recognize the complaint and said he knew nothing about when the lawsuit was filed. Curiously, all inquiries made into when Monroe first considered or authorized filing suit, and whether he was aware of the suit prior to it actually being filed, were objected to on the basis of attorney-client privilege. Because Monroe bears the burden of showing that *Rule 23(a)(4)* is satisfied, and Monroe offered virtually no evidence refuting glaring questions as to his adequacy as a class representative, and because the district court is accorded great deference in deciding class certification issues, there was no abuse of discretion.

B. Fourth Amendment Claim

The district court dismissed Monroe's Fourth Amendment claim under Rule 12(b)(6). Monroe alleges the district court required him to plead facts sufficient to *prove* his claim, instead of merely requiring "enough facts from which the trial court could *infer* a basis for [Monroe's] claim" when viewed in conjunction with potentially discoverable facts, as Rule 12(b)(6) requires. An order granting dismissal under *Rule 12(b)(6)* is reviewed de novo taking "the factual allegations in the complaint as true." *Bass v. E.I. DuPont de Nemours & Co.*, 324 F.3d 761, 764 (4th Cir. 2003). However, the court "need not accept the legal conclusions drawn from the facts, and [ ] need not accept as true unwarranted inferences, unreasonable conclusions, or arguments." *Jordan v. Alternative Res. Corp.*, 458 F.3d 332, 338 (4th Cir. 2006).

On a Rule 12(b)(6) motion, a "complaint must be dismissed if it does not allege 'enough facts to state a claim to relief that is plausible on its face.'" *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). In *Twombly*, The Supreme Court upheld a Rule 12(b)(6) dismissal because the complaint did not allege sufficient facts showing a claim was plausible rather than merely conceivable. 550 U.S. at 570. Thus, "[i]n reviewing a motion to dismiss an action pursuant to Rule 12(b)(6) . . . [a court] must determine whether it is plausible that the factual allegations in the complaint are

'enough to raise a right to relief above the speculative level.'" *Andrew v. Clark,* 561 F.3d 261, 266 (4th Cir. 2009) (quoting *Twombly,* 550 U.S. at 555).

To establish a Fourth Amendment claim, Monroe must show he was (1) unreasonably (2) seized (3) by a government actor. *See Henry v. Purnell,* 501 F.3d 374, 380, 382 (4th Cir. 2007). The district court dismissed Monroe's claim because he failed to sufficiently plead facts showing he was seized. Monroe's complaint, which must be taken as true, alleges the following to establish seizure:

> 1.He "was visited in his home and coerced into giving a DNA sample;"
>
> 2. The encounter was not consensual because "Monroe had both an objectively and subjectively reasonable belief that he was not free to decline the officer's request or otherwise terminate the encounter;"
>
> 3. The officer was in uniform and did not tell Monroe he could terminate the encounter;
>
> 4. The encounter was at Monroe's home and he was concerned neighbors would view him "as a snitch;"
>
> 5. Monroe, based on his and others' interactions with police, believed he had to comply with the officers, and the fact that he was approached at his home meant he "was not free to terminate the interaction;" and

6. Monroe's belief that he could not terminate the encounter was objectively reasonable based on "[t]he state of relations between law enforcement and members of minority communities."

A seizure does not occur, and the Fourth Amendment is not implicated, when an officer merely "approaches an individual and asks a few questions." *Florida v. Bostick,* 501 U.S. 429, 434, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991). To elevate such an encounter to a seizure, a reasonable person must feel he is not free to disregard the officer and terminate the encounter. *Id.* This objective determination is made by "taking into account all of the circumstances surrounding the encounter." *Id.* at 437. Thus, to survive a Rule 12(b)(6) motion, it must be plausible on its face that the facts alleged in Monroe's complaint state a claim to relief (i.e., establish a seizure).

The district court properly concluded that Monroe's subjective beliefs were irrelevant in assessing whether a reasonable person would have felt free to terminate the encounter. Monroe attempts to circumvent the objective standard by stating that if his beliefs are shared by a sufficient proportion of the population then his belief is objectively reasonable. It is important to note what rule Monroe is asking this court to adopt. To agree that Monroe's subjective belief that he was not free to terminate the encounter was objectively reasonable because relations between police and minorities are poor would result in a rule that all encounters between police and minorities are seizures. Such a rule should be rejected. A similar argument

was rejected in *United States v. Analla,* 975 F.2d 119 (4th Cir. 1992). In *Analla*, the defendant argued it was objectively reasonable for him to believe he could not terminate a consensual encounter based on his experience with police. *Id. at 124*. This claim was rejected because the analysis is an objective one. *Id.* Thus, while Monroe's subjective beliefs may be facts, they are irrelevant facts that neither plausibly give rise to a right to relief nor suggest there are discoverable facts that may plausibly give rise to a right to relief.

The remaining facts in the complaint regarding the alleged seizure do not satisfy the *Twombly* test either. First, Officer Mooney's failure to tell Monroe that he could terminate the encounter has been rejected as a means of establishing a seizure, and does not imply there are discoverable facts that establish otherwise. *Id.* (citing *INS v. Delgado,* 466 U.S. 210, 216, 104 S. Ct. 1758, 80 L. Ed. 2d 247 (1984)*)*. Second, the allegations that Monroe was "coerced," that his belief was "objectively reasonable," and that the encounter "was not [ ] consensual" are legal conclusions, not facts, and are insufficient. *Bass,* 324 F.3d at 765. The remaining two facts--that Officer Mooney was in uniform and he approached Monroe at his home--merely describe many consensual encounters, are insufficient to survive a Rule 12(b)(6) motion, and do not imply there are other discoverable facts that "raise a right to relief above the speculative level." *Twombly,* 550 U.S. at 555. Thus, the district court did not err in dismissing Monroe's Fourth Amendment claim.

C. Equal Protection Claim

The district court dismissed Monroe's equal protection claim stating, "that (1) when a victim of a crime provides investigators with a description of her assailant, (2) that description includes the assailant's race and gender, and (3) investigators then act on that description, there is no express racial classification." Thus, citing *Brown v. City of Oneonta*,[4] the district court held the Equal Protection Clause was not implicated. Monroe argues that this reasoning was rejected in *Shelley v. Kraemer*, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948), and *Evans v. Newton*, 382

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[4]Although *Brown v. City of Oneonta* was criticized by Judge Calabresi in his dissent from denial of rehearing of the case en banc, *see Brown v. City of Oneonta, 235 F.3d 769, 783, 785-86 (2d Cir. 2000)* (Calabresi, J., dissenting), and in several academic journals, *see, e.g.*, Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*, 71 U. Chi. L. Rev. 1275, 1344-46 (2004); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 Harv. L. Rev. 493, 511-13 (2003); R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. Rev. 1075 (2001), it has not been judicially cited or discussed either in concurrence or dissent, except in its state court counterpart, *Brown v. State*, 45 A.D.3d 15, 841 N.Y.S.2d 698 (N.Y. App. Div. 2007). Because of fundamental differences in the evidence in this case, as compared with the facts in *Brown*, disapproval of *Brown* is almost totally irrelevant to this dispute. Indeed, Judge Calabresi's dissent, when fairly interpreted, supports, rather than disparages, the racial classification result reached by the district court in this litigation.

U.S. 296, 86 S. Ct. 486, 15 L. Ed. 2d 373 (1966) (both holding that judicial enforcement of private restrictive covenants based on race amounted to government action violative of the Equal Protection Clause). Monroe argues that because the Equal Protection Clause prohibits all racial classifications and because officers stopped Monroe because he was black, the Equal Protection Clause was implicated and the officers' actions are subject to strict scrutiny. Monroe also claims the City's argument--that race was but one factor among many--was rejected by *Grutter v. Bollinger,* 539 U.S. 306, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003).

The Equal Protection Clause "provides that no State shall 'deny to any person within its jurisdiction the equal protection of the laws.'" *Fisher v. King,* 232 F.3d 391, 399 (4th Cir. 2000) (quoting U.S. Const. amend. XIV, § 1). The Clause "'is essentially a direction that all persons similarly situated should be treated alike.'" *Id.* (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985)). An equal protection violation occurs in one of two ways: (1) when the government explicitly classifies people based on race, or (2) when a law is facially neutral, but its administration or enforcement disproportionately affects one class of persons over another and a discriminatory intent or animus is shown. *Sylvia Dev. Corp. v. Calvert County,* 48 F.3d 810, 818-19 (4th Cir. 1995). Monroe alleges the City explicitly classified him based on race, and its actions are subject to strict scrutiny.

The City did not so classify Monroe on the basis of his race. The officers in this case did not approach Monroe because he was African-American; rather, Monroe was approached because he matched the description of the suspect given by several victims. This is not a case in which police created a criminal profile of their own volition and decided which characteristics, such as race, that the criminal possessed. Nor is this a situation where police were faced with conflicting or uncertain evidence as to the assailant's race and made the decision to pursue only African-Americans. Rather, as earlier indicated, the police decided to approach Monroe based on the similarity between him and the several elements of the victims' descriptions, not because of a plan to investigate African-Americans. Certainly the description included the fact that the suspect was African-American, but the officers were not the source of that portrayal. Instead, that description came from private citizens--the several victims of a sex crime reciting facts as they existed when the violent felony was being committed.

The *Grutter* decision itself illustrates why there is no invidious racial classification in this case. In *Grutter*, the University of Michigan Law School, in furtherance of its purported academic goals, bottomed at least in part on student body diversity, exercised its academic freedom "to *make its own judgments* as to . . . the selection of its student body" based on the race of applicants. 539 U.S. at 329 (emphasis added). Here, however, the officers did not exercise their own judgment in the selection of the suspect. Unlike in *Grutter*, there was no conscious choice made on the

part of officers to label the suspect as black--the officers played no role in deciding what characteristics the suspect possessed. Instead, officers merely recorded facts as they existed and conducted an investigation based on those facts.

The Equal Protection Clause requires an "express racial classification," which occurs when *the government* distinguishes among the citizenry on the basis of race. *See Shaw v. Reno,* 509 U.S. 630, 643, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993). And, it is clear the officers in this case made no such distinction when establishing the suspect's characteristics--any descriptive categorization came from the rape victims who described their assailant.

Monroe's reliance on *Shelley* for the proposition "that state action which incorporates a privately originated, race-based, classification . . . constitute[s] impermissible race-based discrimination by the government" proves too much. Monroe's interpretation of *Shelley*, taken to its furthest bounds, could result in almost all private acts taken into account by government actors being deemed state action. But the Supreme Court has never taken *Shelley* this far. In *Shelley*, the Supreme Court decided whether judicial enforcement of restrictive covenants, "which [had] *as their purpose* the exclusion of persons of designated race or color from the ownership or occupancy of real property," constituted government action. 334 U.S. at 4 (emphasis added). These covenants were *purposefully* created by private actors to deny African-Americans the right to own property, and were only effective to the extent they were enforced by the judiciary. *Id.*

When a victim describes an assailant, however, she is neither singling out a racial group on the basis of personal choice, nor purposefully doing so in an effort to deny that racial group a constitutional right. Instead, the victim is merely describing facts for the purpose of apprehending a known criminal. *Shelley* is inapplicable.

A recent Supreme Court case, *Ashcroft v. Iqbal,* 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009), further illustrates the absence of a racial classification in this case. After the September 11, 2001, attacks, federal agents began an investigation "to identify the assailants and prevent them from attacking anew." *Id.* at 1943. Javaid Iqbal, a Pakistani Muslim, was one of numerous individuals detained. *Id.* at 1942-43. Iqbal was arrested on charges of fraud and conspiracy, pled guilty, served his jail term, and was removed to Pakistan. *Id.* at 1943. Following his removal, Iqbal filed a *Bivens* action[5] against dozens of federal officials. *Id.* Among other allegations, Iqbal claimed that these federal officials labeled him "a person of high interest on account of his race, religion, or national origin, in contravention of the First and Fifth Amendments." *Id.* at 1944. The district court denied the defendants' motion to dismiss for failure to state a claim, and the court of appeals affirmed. *Id.* The Supreme Court granted certiorari and reversed. *Id.* at 1945.

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[5]*Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).

Analyzing Iqbal's complaint under *Twombly*, the Supreme Court considered whether the factual allegation that government officials "arrested and detained thousands of Arab-Muslim men . . . as part of its investigation of the events of September 11" plausibly suggested an entitlement to relief for invidious discrimination. *Id. at 1951* (omission in original). The Court held it did not. *Id. at 1951-52*. Specifically, the Court noted that Arab-Muslim men were responsible for the September 11 attacks, and "[i]t should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims." *Id.* at 1951. The same is true in this case. Because of the victim's racial identifications, the resulting "incidental" impact of police investigations on young, black men in the Charlottesville community did not stem from an explicit government classification, at least for purposes of equal protection jurisprudence.

Because we agree with the district court's finding of no express governmental racial classification in this case, Monroe's equal protection claim is foreclosed. Moreover, although the factual record may not have been completely developed below, we have little doubt that the challenged investigation would survive strict scrutiny analysis based on the undisputed facts now in the record.

To survive strict scrutiny, a racial classification must (1) be narrowly tailored and (2) further a

compelling government interest. *Grutter,* 539 U.S. at 326. The government's interest in protecting the citizenry from crime is without question compelling. *Schall v. Martin,* 467 U.S. 253, 264, 104 S. Ct. 2403, 81 L. Ed. 2d 207 (1984). Thus, the only remaining issue would be whether the investigation in this case was narrowly tailored to further that compelling interest, and, without argument, it was. The use of race was but one "pertinent element" or characteristic of the suspect. *See Grutter,* 539 U.S. at 335 (permitting the use of race in the school's admissions process when it was only one factor of many considered). Further, the use of race and how much weight it imposed upon the investigation was flexible in light of all the facts presented to the officers. Rather than a single victim or a witness recanting with hesitation or uncertainty as to the assailant's race, officers were told by several unrelated rape victims that their assailant was undoubtedly black. In addition, this was not a dragnet that attempted to question every black male in the Charlottesville area. Instead, officers approached those individuals who matched the description of the suspect and who sensitized the officers' investigatory suspicions by being picked up on a separate sexual offense or by being reported to police via Crimestoppers, among other ways. According to the 2000 U.S. Census there are several thousand black males in Charlottesville, but police questioned only 190 individuals over a period of several years. Thus, the challenged investigation was narrowly tailored to further the government's compelling interest.

Returning to *Ashcroft v. Iqbal*, we note that the Supreme Court's language on the issue of the

investigatory process is instructive in our analysis of the legitimacy of the City's activities. Even though thousands of Arab-Muslim men were investigated in *Iqbal*, the Supreme Court deemed this insufficient to render a legitimate investigatory process unconstitutional. This leaves no doubt as to the justifiability of the City's investigation. In accord with a compelling interest to detect and prevent crime, officers narrowed their investigation to only those individuals who reasonably matched the descriptions given by the victims. The officers then further narrowed their investigation, as noted above, to only those individuals who came to their attention as potential suspects. Because the description of the assailant included being a young-looking black male, it is no surprise that the officers' investigation almost certainly produced a disparate but incidental impact on young, black males, even though the purpose of the investigation was to target neither African-Americans nor males.

III.

For the foregoing reasons, we hold that the district court did not err either in denying Monroe's motion for class certification, or in dismissing Monroe's Fourth and Fourteenth Amendment claims.

AFFIRMED

[COURT OF APPEALS ORDER ON PETITION FOR REHEARING]

FILED: September 29, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1334
(3:05-cv-00074-NKM-JGW)

LARRY MONROE, on behalf of himself and all others similarly situated,

Plaintiff - Appellant

v.

THE CITY OF CHARLOTTESVILLE, VIRGINIA; TIMOTHY J. LONGO, SR., In his official capacity; JAMES MOONEY, Police Officer in his official capacity,

Defendants - Appellees

ORDER

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Shedd, Judge Beam and Judge Anderson.

For the Court

/s/ Patricia S. Connor, Clerk